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In The
# Supreme Court of the United States

ANGELA PERRY and MICHAEL GREEN,

*Petitioners,*

v.

MAV MIRFASIHI, on behalf of himself and all others similarly situated, and FLEET MORTGAGE CORP.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## *AMICI CURIAE* BRIEF OF THE CENTER FOR PUBLIC INTEREST LAW, PRIVACY RIGHTS CLEARINGHOUSE, CONSUMER FEDERATION OF AMERICA, AND ESSENTIAL INFORMATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## INTEREST OF *AMICI CURIAE*[1]

The instant case involves two major issues of concern to all four *amici curiae*. The first is the scope of the federal Fair Credit Reporting Act (FCRA). As organizations that cover consumer/regulatory issues, *amici* are concerned with lines for regulatory inclusion or exemption. In particular, *amici* regularly examine how such definitions work in relation to legislative intent. The failure to match jurisdictional reach with legislative purpose may allow for the loopholing of requirements for some. Such loopholing may then produce special exceptions for some, inimical to fair competition (*e.g.*, where those within regulatory purview suffer competitive disadvantage *vis-a-vis* those who claim exemption).

Second, *amici* are concerned about the fiduciary duties of counsel to the class in class action litigation. We are especially concerned about the possible misuse of the judiciary by defendants who "shop" cases between contending plaintiff counsel – settling with the most malleable attorney in return for fees received for minimal hourly inconvenience. Such

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record received timely notice of *amici*'s intent to file this brief, and all parties consented to the filing of this *amici curiae* brief. Their letters of consent have been filed with this Court under separate cover.

Pursuant to Rule 37.6, *amici* state that this brief was not written in whole or in part by counsel for a party, and no other individual or entity has made a monetary contribution intended to fund the preparation or submission of this brief.

settlements may properly foreclose all absent class members from future remedy, or may effectively terminate actions by other potential class representatives.

***Center for Public Interest Law.*** The Center for Public Interest Law (CPIL) is an academic center and statewide law firm representing the interests of consumers, and focusing on issues of regulatory law, government transparency, and legal ethics. CPIL is based at the University of San Diego School of Law and has been in existence since 1980. It publishes the CALIFORNIA REGULATORY LAW REPORTER.

CPIL and its director have been involved in this issue in multiple roles. CPIL director Professor Robert Fellmeth, Price Professor of Public Interest Law, was appointed California State Bar Discipline Monitor in 1987 by the California Attorney General, reporting to then-California Supreme Court Chief Justice Malcolm Lucas. He held that position until 1992, with CPIL serving as the Monitor's staff. Part of his work involved the study of attorney obligations and Bar enforcement of those standards. His work as State Bar Discipline Monitor culminated in reform legislation during 1989-91, including the creation of the current State Bar Court, which adjudicates the discipline of attorneys under the direct purview of the California Supreme Court.

CPIL director and principal *amici* brief author Professor Fellmeth has taught consumer law periodically from 1977, including consideration of class

action issues and the ethical obligations of counsel. He has taught Public Interest Law and Practice since 1980. He is the co-author of the treatise *California White Collar Crime* (Lexis 2002, with Thomas A. Papageorge), which includes coverage of class action issues, as well as attorney regulatory issues. Professor Fellmeth has participated in or contributed to (as counsel to an interested or involved party) 40 published appellate decisions, most pertaining to unfair competition or legal ethics issues. Over the past twenty years, he has served as an expert consultant/ witness on consumer law and attorney obligation issues in over 30 matters, including his retention by (a) the California Attorney General in proceedings before the California Commission on Judicial Performance, (b) the U.S. Attorney for the Southern District (in the prosecution of the Orange County *Cumis* counsel cases – the "Alliance"), (c) the District Attorney of Los Angeles County, (d) the District Attorney of San Diego County, and (e) the California and Washington State Bars (*e.g.*, in disbarment proceedings for unfair competition abuses by the Trevor Law Group, among others). Professor Fellmeth also served as special consultant to the California Legislature's Law Revision Commission in its consideration of the state's Unfair Competition Law (California Business and Professions Code § 17200 *et seq.*), which included class action-related flaws relevant to the instant issue.

***Privacy Rights Clearinghouse.*** The Privacy Rights Clearinghouse (PRC) is a non-profit consumer

organization that advocates for and empowers consumers to take action to control their own personal information. Founded in 1992 in San Diego, California, the PRC responds to specific privacy-related issues from consumers, intercedes on their behalf, and, when appropriate, refers consumers to the appropriate organizations and government regulatory agencies for further assistance. The PRC has been a vocal advocate for consumers' privacy rights in local, state, and federal public policy proceedings, including legislative testimony, regulatory agency hearings, task forces, and study commissions.

The founder and director of the PRC is Beth Givens. She has developed the Fact Sheet series, consisting of more than 50 comprehensive consumer guides, as author and/or editor. She authored the encyclopedia entries on identity theft for *Encyclopedia of Privacy* (2007), *World Book Encyclopedia* (2004) and *Encyclopedia of Crime and Punishment* (2002). She is author of *The Privacy Rights Handbook: How to Take Control of Your Personal Information* (Avon, 1997) and is co-author of *Privacy Piracy: A Guide to Protecting Yourself from Identity Theft* (1999). She contributed a chapter on consumer and privacy rights to the 2006 book, *RFID: Applications, Security and Privacy*.

The PRC's interest in the instant proceeding is demonstrated by the variety of consumer-related services it offers on an ongoing basis, including (1) a hotline for consumers to report privacy abuses and request information on ways to protect their privacy;

(2) an extensive series of fact sheets on privacy issues, available in English and in Spanish; (3) a web site (www.privacyrights.org) that makes available all fact sheets and FAQs, transcripts of PRC speeches and testimony, and accounts of consumers' experiences; (4) a referral service for journalists and policymakers who are seeking victims of privacy abuses who have indicated a willingness to talk with the media and/or testify in legislative and regulatory agency hearings; and (5) a speakers service, in which PRC staff make presentations at conferences, employee training sessions, and civic and community group meetings.

***Consumer Federation of America.*** Consumer Federation of America (CFA) is a non-profit association of some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people. CFA was founded in 1968 to advance the consumers' interest through research, advocacy and education. CFA has a long history of educating consumers about and advocating for stronger credit reporting consumer protections. For example, CFA has strongly supported the use of adverse action notices for credit and insurance purposes as essential to informing consumers about higher rates that they may have to pay as a result of the credit or insurance score. In December 2002, CFA along with the National Credit Reporting Association (NCRA) issued a report on credit scoring, *Credit Score Accuracy and Implications for Consumers*. The report documented that millions of Americans could be paying more for –

or be denied – credit, insurance, or utilities because of inaccurate or incomplete credit scores and reports. CFA has conducted consumer knowledge and opinion surveys about credit scoring, documenting that many consumers do not understand basic facts about how credit scores are developed. CFA has also published a free educational brochure for consumers with Fair Isaac Corporation entitled "*Your Credit Scores.*"

***Essential Information.*** Founded in 1982 by Ralph Nader, Essential Information is a non-profit, tax-exempt organization. It is involved in a variety of projects to encourage citizens to become active and engaged in their communities. It provides provocative information to the public on important topics neglected by the mass media and policy makers. Essential Information publishes a monthly magazine, books and reports, sponsors investigative journalism conferences, provides writers with grants to pursue investigations and operate clearing houses which disseminate information to grassroots organizations in the United States and the Third World.

Essential Information's focus on consumer rights makes the decision below of particular concern in its impact on privacy and credit safeguard issues. Essential is also concerned about the need for class action settlements to protect the bona fide interests of class members, not merely the convenience of the courts or the monetary concerns of involved attorneys.

## I. The Exemption from Fair Credit Reporting Act Compliance Inherent in the Decision Below Violates the Statute's Terms and Intent, and Will Effectively Eviscerate the Protections of the Act Relied Upon by Consumers Nationally.

The federal Fair Credit Reporting Act (FCRA, 15 U.S.C. § 1681 *et seq.*) has grown in importance over the last decade – with an exponential increase in its needed consumer protections given current and projected problems. The combination of instantaneous mass communications and the rather significant credit crisis now extant add momentous gravity to the issues raised by petitioners.

The FCRA regulates "credit reporting agencies, users of credit reports, and those who furnish information about consumers to reporting agencies." *See* 1-16 Consumer Credit Law Manual § 16.01 (Matthew Bender and Company, 2004). A consumer credit report advises those who advance credit as to the risk of lending to a given consumer. Lenders (including Respondent Fleet Mortgage Company) use such information, as do many other commercial interests. The statute includes numerous important provisions to protect consumers: required transparency, consumer right to review information being disseminated about them, the opportunity to learn of a negative report, standards applicable to agencies for data reliability, and requirements to reinvestigate and to allow consumers to correct errors. *See* 15 U.S.C. §§ 1681d, 1681g, 1681h, 1681i, 1681m, 1681s-2.

These protections concern what is now a basic underpinning of consumer welfare, if not – for millions of Americans – consumer viability. That credit report will influence whether a job offer is forthcoming, an insurance policy written, or a mortgage approved. It determines whether monies will be advanced to allow a consumer to buy a home – or to keep a home under threat of foreclosure. Under regrettable current credit card practices, banks and other creditors claim *carte blanche* to "alter the terms" of pre-existing card contracts. They then use credit reports as a basis to cut off promised credit levels, demand earlier payment, and/or increase credit card rates – sometimes from single digits to 20-30% per annum – more than ten times their cost of funds. Similarly, millions of mortgages have been advanced on a classic "bait and switch" format, with temporary "ARMs" at low interest, only to be switched to rates beyond the payment ability of millions. Credit reports then become the crucible that will determine whether alternative financing at competitive, fair rates is obtainable.

Beyond credit information error is the broader issue of privacy incursion. A leading treatise summarizes the FCRA purpose in this regard:

> As the world goes digital, consumers' records, both financial and otherwise, are increasingly vulnerable to exposure. Unregulated databases, escalating numbers of corporate mergers and the proliferation of information brokers – private investigators who specialize in obtaining computerized records – all

> threaten privacy. The Internet raises particular privacy concerns, as information sent over the Internet may pass through dozens of different computer systems, each of which can snatch and hold it. In addition, web site owners can track consumers' online behavior and thereby gather information about their preferences, often without their knowledge.

1-16 Consumer Credit Law Manual § 16.01[1], *supra*.

Because of the importance of credit reports in the modern era of mass communications, the FCRA has been written to apply broadly. The FCRA regulates the activities of credit reporting agencies, users of credit reports, and those who furnish information about consumers to reporting agencies. It was amended to reinforce its breadth by the Consumer Credit Reform Act of 1996, as part of the Omnibus Consolidated Appropriations Act of 1996 (Pub. L. No. 104-208, 110 Stat. 3009). It applies when a "person" (broadly defined) collects information on a "consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living" – on any one of those subjects. The Act applies where such information is used by a third party as a basis for denying or increasing the charge for "credit or insurance to be used primarily for personal, family, or household purposes." 15 U.S.C. § 1681a(d).

The FCRA

> is intended to protect consumers from invasion of privacy and the dissemination of

> false, outdated, or misleading information by placing various obligations on persons who use or disseminate credit information about consumers. Consumer reporting agencies must adopt reasonable procedures to ensure that the information they disseminate is accurate and up-to-date and that it is furnished only to users with certain permissible purposes.

1-16 Consumer Credit Law Manual § 16.01, *supra*, citing 15 U.S.C. §§ 1681e, 1681k, 1681l. Violations of the Act give rise to a private cause of action by affected consumers and/or trigger Federal Trade Commission involvement. 15 U.S.C. §§ 1681n, 1681o.

Because of the consumer interests here implicated, the FCRA has been written with an intended inclusionary breadth. It is not at all confined to the three major credit bureaus (Equifax, TransUnion, and Experian), but extends broadly to any person who gathers and disseminates such information about consumers to third parties. A credit reporting agency must be a "person" – with the definition "broadly defined to include any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *See* 1-16 Consumer Credit Law Manual, § 16.02, *supra*, at [4]. And the requirement that a business "regularly extends" credit to be covered is set by regulation to activate where credit is extended more than 25 times in one year. *Id.*, citing applicable FTC regulations.

The narrow exceptions that are statutorily drawn illuminate the Congressional intent in its coverage breadth. Hence, an inquiry made by an insurer, employer, or creditor that pertains only to the transaction in which it is engaged and is not disseminated beyond those two parties does not give rise to coverage. The Act as amended in 1996 excludes from the definition of "consumer report" certain common communications made to employment agencies where three specific criteria are met (including consumer consent). 15 U.S.C. §§ 1681 a(d)(2)(D) and (o). The Act excludes information communicated among gatherers who are closely affiliated with each other – but only if the consumer is given the chance to deny its disclosure to that affiliate. 15 U.S.C. § 1681a(d)(2)(A)(ii)(iii). And a creditor who reports only information about its own experience with a consumer is not issuing a "consumer report." "If, however, the creditor reports any information other than that obtained from its first-hand dealings with the consumer, it does become a consumer reporting agency subject to the Act." 1-16 Consumer Credit Law Manual § 16.02, *supra*, at 9[b].

With this background in mind, the Seventh Circuit in the case below (*Mirfasihi v. Fleet Mortgage Corporation*, 551 F.3d 682 (7th Cir. 2008)) held that a mortgage lender that gathered information beyond its own sources and then *sold* that *combined* information about customers – not 25 times but to more than one million persons – is not covered by the Act. With all due respect, a fair reading of the statute and its legislative history, through and including its 1996

amendments, illuminates this error as *in extremis* to a degree disappointing to those who regard our appellate courts with the intellectual respect they should properly command. But the rationale for granting *certiorari* to review the instant matter rests on two considerations beyond an alleged error in a statutory definition. First, this error has not been committed by other circuits. It is thus far unique to the Seventh, as petitioners argue. And the existence of a conflict among the circuits is a traditional basis for Supreme Court intervention and resolution.

Second, the urgency here goes beyond that traditional basis for review, for here we have an opening to create a "race to the bottom" that threatens not merely inconsistent application of the law between the circuits, but its potential evisceration. Compliance with the Act involves delay, expense, liability, and competitive disadvantage *vis-a-vis* those who need not comply. If any entity, much less a major financial institution, is allowed to gather information and sell it *en masse* within the states of the Seventh Circuit – free and clear of any transparency, accuracy standards, consumer access opportunity, obligation to reinvestigate or correct, or vulnerability to private remedy or FTC enforcement for such noncompliance – that has implications in the nationwide credit reporting agency market. Those states will become attractive magnets for corporate headquarters from which to disseminate data gathered worldwide and disseminated worldwide. What limitation here would impede such evasion of the Act by mortgage lenders or others similarly situated? What are the reasonable

economic consequences? What are the likely implications for credit report consumer protection in relation to applicable Congressional intent?

Apparently, the circuit court did not understand what Fleet Mortgage was doing and how it related to the FCRA. Fleet clearly engaged in credit report checks in its evaluation of borrowers. It reviewed and evaluated information from the same Experian, TransUnion, and Equifax agencies commonly used and incorporated that information in its own rating decisions. It then sold that information through its own offices. The problem here is not one of intellectual property copyright infringement. Neither *amici* nor petitioners care whether the Fleet information properly attributes its sources. The problem the Seventh Circuit did not grasp is that the three major primary source agencies (Equifax, TransUnion, and Experian) are all complying with the FCRA. Accordingly, consumers have the benefit of that Act's important set of protections about notice when credit is denied based on such information, transparency, opportunity to correct, etc., as noted above. But if the Seventh Circuit's ruling stands, what does a consumer do when, for example, Experian's information is repackaged by Fleet for sale and subsequent credit denial? What if there is an error with Experian, a consumer gets it corrected under the FCRA, but Fleet has already incorporated that error in its credit report? Does the consumer have the right to notice that Fleet is the source of his rejection or higher interest or lower credit line? Fleet is purportedly not

within the FCRA that requires such notice. What does he do where he fortuitously learns that Fleet is the source of the ding? How will he get Fleet to make a correction? Even if Fleet is simply repeating an earlier, erroneous report from Experian, the remedy Congress created is now impotent. It is out there and is now spreading via innumerable conduits exempt from the statute. The consumer caught in the nightmare of false credit information, sometimes stimulated by egregious identity theft, already has a mountain to climb to undo what has been done to him under the FCRA with the three largest agencies. The Seventh Circuit here creates more than a mountain – it moves resolution out of the solar system.

There are lots of Fleet Mortgages. And if they can make this gathering and sale of credit-related information to third parties which are immune from the FCRA (they are reporting credit information about many thousands of Americans to many thousands of creditors, but they are apparently not a "reporting agency"), why would not many more mortgage companies seek to pick up money by such information sale? They are without liability or accuracy obligation. Are they going to *sua sponte* recheck their sources for correction? Why? The FCRA allegedly does not apply to them.

These petitioners before this Court present to it in their petition subject matter of special concern involving the effective abnegation of Congressional intent, and reasonably projected irreparable injury for millions of Americans. *Amici curiae* acknowledge

that rhetorical hyperbole in claims to draw the attention of this Court, given its necessarily limited selection of cases, may be all too common. But *amici* respectfully ask this Court to consider with some care: (a) the significance of consumer credit reporting and consequent credit decisions on the American consumer in 2009; (b) the rationale behind the FCRA and its palliative effects over the past two decades on credit – limiting somewhat error and abuse; and (c) the impact of the categorical exemption from those protections created by the Seventh Circuit in the decision below.

This is not merely another case of "conflict among the circuits." The Court is here presented with such a conflict in a competitive market setting where commercial lenders and data gathering enterprises may move geographically to provide effective evasion of a principal consumer protection statute at a time when its coverage has never been more important.

## II. The Approval of a "Sweetheart" Class Action Settlement Over Responsible Objection Gives this Court an Opportunity to Establish Proper Class Approval Standards for Judicial Branch Enforcement of Statutes.

The importance of the class action mechanism is well-illustrated in the case at bar. The cost of bringing an individual case of statutory noncompliance with the FCRA inhibits its presentation in any judicial forum. Even if such disputes could be resolved

on the basis of numerous small claims actions, that jurisprudential option has three disadvantages: (a) The relatively low maximums for recovery (commonly $5,000 to $10,000) might not match the actual damage for many consumers, precluding their full recovery; (b) the very partial disgorgement of unjust enrichment from violators may not provide any effective deterrent consequence for statutory compliance; and (c) the fragmentation of similar questions of fact and law into hundreds or thousands of individual adjudications yields inconsistencies in results and diseconomies of scale. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 809 (3d Cir. 1995). A rational society combines similar factual and legal issues into manageable packages for efficient adjudication.

But the class action format has some features that require judicial adjustment from typical adjudicatory practice. The American system with its English origins departs from the Napoleonic model prevalent in much of the world. We rely more on a contest before a passive court. That contest works well to produce an optimum outcome where (a) the contending interests have an approximate balance in advocacy resources, and (b) the parties contending before the court have a *bona fide* dispute with effective representatives of all relevant points of view. To address the former flaw, constitutional law doctrine works to protect an adversarial system by subsidizing

that weaker side (*e.g.*, *Gideon* counsel for criminal defendants,[2] *Lassiter* counsel for parents threatened with the loss of parental rights,[3] required due process steps where the state is involved in takings,[4] affirmative obligations of prosecutors to provide discovery, etc.). And state bars and public agencies attempt to redress imbalances through legal aid, *pro bono* contribution, and other means to provide access to the courts and advocacy before them. Liberal standing policies and permissive joinder also allow for plaintiff opportunity to reach the courts. And class action allowance addresses the starkest deficiency in court enforcement of statutory compliance – the ability of thousands or millions to combine to reach the courts and argue their common interest. But this last ameliorative mechanism, however necessary, threatens the underlying assumption behind the court's passive role – that those before the court represent *bona fide* contending interests.

The concern over this dynamic reaches its zenith in class action settlements. Here, a given law firm and a "class representative" purport to represent an often large class of persons whose cumulative stake is substantial. The defendant faces serious liability. There is a strong incentive for a negotiated settlement. Counsel for the class often has substantial

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[2] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[3] *Lassiter v. DSS*, 452 U.S. 18 (1981).

[4] *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972).

client control over the class representative that it (practically speaking) generally selects. The defendant's interest is clear – to minimize losses. It makes economic sense for defendant to pay a substantial fee to plaintiff's counsel in return for a class settlement that (a) minimizes the possible huge financial payment to the class, (b) lowers transactions costs – including large hourly-based fees to defense counsel, and (c) maximizes collateral effect to foreclose possible suits by others (with perhaps higher demands for class recompense). Obviously, out of almost two million nationally licensed attorneys, finding a number who are willing to take six or seven figures in return for token payment to absent class members and the provision of substantial immunity from other plaintiff class representatives and counsel is not difficult.[5]

Federal Rule of Civil Procedure 23 and court precedent rely on several mechanisms to assure the due process rights of absent class members and other existing or potential alternative or competing class representatives and counsel. First, court decisions make clear that class representatives must be "adequate." Rule 23(a). Not only must their claims be typical, but they must be capable of and interested in

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[5] The public interest group Public Citizen has devoted substantial resources to tracking and objecting to proposed settlements in some of the problem class actions, including the coupon cases where the benefit to the class is actually a marketing tool for defendants to increase profits (*see* www.citizen.org for presentation and discussion of various class settlement abuses).

carrying the ball for the absent class members whose grievance they litigate. Second, the class representatives owe a fiduciary duty to the other members of the class to not take a disproportionate reward nor to facilitate high attorney recompense in return for a minimal judgment that then bars other litigants. Third, there is required notice of class certification and of settlement terms – including the proposed fees to be paid counsel. Fourth, the court must give objectors a chance to be heard under FRCP 23(e) and conduct an appropriate hearing so the court may necessarily find that the settlement is "fair, adequate and reasonable, and not a product of collusion."[6] These steps are intended to assure both FRCP compliance and due process in the judiciary's critical grant of finality (collateral estoppel effect).[7] Counsel for the class has a critical role in these steps. The adequacy of the class representative can and often does include consideration of the adequacy of counsel to represent the interests of the class, including background, resources, and competence. And counsel has a fiduciary duty of the highest order to the client that necessarily includes the obligation to honor the fiduciary duty of the client to the class.

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[6] *Joel C. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000).

[7] *See* FRCP 23(e) requiring approval; *see also Duhaime v. John Hancock Life Insurance*, 183 F.3d 1 (1st Cir. 1999), requiring notice to the court of objectors.

The problem is that these measures often fail in the crucible of actual litigation.[8] They fail because of an understandable trial court mind-set that encourages settlement. The courts will want to reward counsel who are professionally amicable and constructive, who seek common ground, who remove complex and time-consuming cases from crowded dockets. An attorney or law firm who "objects" where the other parties have struck an agreement may be viewed, as the common cliché indicates, as the "skunk at the garden party." The instant case presents a stark example of the influence of that common and unsurprising judicial instinct. Here we have a class representative and their counsel who have brought to the class a marginal benefit. Apparently, the 200,000 in the part of the class who bought products from the telemarketers were given access to a claims process, but the 1.4 to 1.6 million larger subclass represented by the objectors got nothing. The separate claims of all class members are now barred. No apparent corrected compliance with the FCRA was ordered. A contingency fee of above 50% of the amount received by clients is generally viewed as excessive if not unconscionable.[9] In this case, the major subclass will

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[8] *See* the helpful symposium: *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* reprinted in the Cornell Law Review at 80 CORNELL L. REV. 811 (1995).

[9] Most expert commentary places an appropriate common fund contingency fee in the 20% to 40% range. We can find no examples of approval over 50%. *See* Jerold S. Solovy, Testimony in Support of the Fund Theory Before the Honorable Albert

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receive no relief, while its purported counsel will receive a court awarded fee of $750,000.

The objectors have no apparent motivation apart from serving the class to a more substantial degree. They have litigated this matter over four years, into the appellate arena, and into a third settlement version. The record does not include respective hours, nor does this appear to be the basis for the attorney fee award here rendered. But the objectors, clearly engaged in comparable litigation efforts from their point of objection forward, were awarded $18,000, or 2.5% of the amount received by class counsel who operated cooperatively with defendants and their counsel. The message transmitted to the courts and counsel of the nation is unsubtle:

> Strike a deal based on defense direction, and we'll back it, enforce it, give it finality, and foreclose the due process rights of other grievants. We'll do so regardless of its terms

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Green in *Hoffman v. First National Bank* (June 1990), Illinois CLE Handbook at § 10.43. Another source notes:

> " . . . the courts, in search of fairness and judicial economy, make comparisons of the fees requested with the percentages awarded in other cases. The court in *In re King Resources Company Securities Litigation*, 420 F. Supp. 610 (D.Colo. 1976), cited its research showing that fee allowances in class actions under the federal securities laws have been 'within the generally accepted range of twenty percent (20%) to thirty percent (30%) of the benefits bestowed upon the class.'" Holstein and Fietsam, FEDERAL CIVIL PRACTICE, Class Actions, § 10.33 "The Customary Fee," (1993).

> (even if it brings little discernible benefit to those allegedly represented in this process, bars hundreds of thousands from individual remedy, and creates *in futuro* immunity for the defendant from FCRA claims). If counsel wishes to participate in an objection, this is what will happen.[10]

This Court and some of the circuits have grappled with this problem obliquely in several cases. Ironically, this same Seventh Circuit addressed an analogous problem in *Crawford v. Equifax Check Services Inc.*, 201 F.3d 877 (7th Cir. 2000). Three competing class actions were filed against the defendant under the Fair Debt Collection Practices Act (improper debt collection letters under 15 U.S.C. §§ 1692e and 1692g). The *Crawford* class was certified and settled by the trial court on an FRCP 23(b)2 injunctive basis, abandoning the 23(b)3 damage class and all damage claims, but foreclosing class status for the other two pending actions. The other two class representatives were denied intervention status to effectively object. The Seventh Circuit noted that "a representative plaintiff acts as a fiduciary for the others" (*id.* at 880) and concluded: "All questions of notice and opt-out aside, the settlement is substantively troubling. Crawford and his attorney were paid handsomely to go away; the other class members received nothing . . . and lost the right

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[10] For a discussion of the context of prior common mistreatment of objectors, *see Silencing the Objectors*, 15 GEO.J.LEGAL ETHICS 177 (2001).

to pursue class relief" (*id.* at 882). The "handsome" attorney fee received in *Crawford* was $78,000. The court voided the settlement and reversed the denial of intervention (objection) rights to the class representatives of the two competing actions.

Two years later, the Seventh Circuit decided *Reynolds v. Beneficial National Bank,* 288 F.3d 277 (7th Cir. 2002). The case involved competing class actions brought against defendants who loaned money against anticipated IRS refunds to taxpayers. The court discussed the problem of the "reverse auction," defined as "the practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with the hope that the district court will approve a weak settlement that will preclude other claims against the defendant" (citing *Blyden v. Mancusi*, 186 F.3d 252, 270 n.9 (2d Cir. 1999)). The *Reynolds* court continued: "The ineffectual lawyers are happy to sell out a class they anyway can't do much for in exchange for generous attorneys' fees, and the defendants are happy to pay . . . " (*id.* at 282). The court discussed in detail the deficiencies of the trial court in examining aggressively the actual value of the case. And the settlement amount in *Reynolds* involved $25 million, with over $20 million devoted to class recovery. The court added: "It is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally. This participation is encouraged by permitting lawyers who contribute materially to the proceeding to obtain a fee" (*id.* at

288). However, that fee requires that counsel "produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class" (*id.*). Presumably, that condition precedent might properly apply *a fortiori* to counsel for the class representative of the certified class who render little benefit as well.

This Court grappled with these problems in the leading case of *Amchem Products, Inc., et al. v. George Windsor, et al.*, 521 U.S. 591 (1997). This set of asbestos injury-related cases raised class action settlement difficulties in daunting complexity. The *Amchem* decision upheld the Third Circuit's vacation of the district court's anti-suit injunction and its decertification of the class. The basis for the decision partly rested on concern for absent class member due process foreclosure, including victims who would later arise and be limited in remedy to a class payment system not including consideration of their circumstance. The case involved what the Court described as an uncommon "sprawling" class definition, and lacked the discrete subclasses that might more precisely tailor remedies to the different victim situations extant. The concern over the fate of ancillary subclasses in *Amchem* appears to have application here, except this subclass is not a speculative group of future asbestos victims, but the vast majority of those who had their private financial information gathered by major agencies, and repackaged in a kryptonite envelope that most of them will not know about and none of them will pierce.

This Court urged in *Amchem* heightened scrutiny of class action settlements, noting a large number of such cases then occurring.[11] The Court noted that the courts need not inquire into management problems of a trial since no trial would occur with a settlement, but emphasized: "But other specifications of the rule – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened, attention in the settlement context" (*id.* at 620). And the Court pointedly made reference to the class settlement problems this case suggests still exist. Here we have, as with *Amchem*, a large group of class members (a subclass eight times larger than the one receiving symbolic relief) receiving not a benefit, but a bar to their future ability – and the future ability of the FTC – to apply the statute to this or similar defendants.

*Amici curiae* respectfully suggest that a clear message to the judiciary in the field is warranted: Their obligation to review class settlements under FRCP 23(e) is properly mindful of the economic incentives that may prevail, that may pervert the adjudicative function, and that may compromise the proper enforcement of statutes consistent with Congressional intent and judicial integrity.

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[11] 521 U.S. at 618, citing T. Willging, L. Hooper, & R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 61-62 (1996).

## CONCLUSION

For the reasons presented above, *amici curiae* respectfully ask this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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